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No. 1071

In the

Supreme Court of the United States

October Term, A. D. 1961

[illegible],

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The Schaffer Press, Inc.—Affidavit 2-4200

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1964.

No. 1071

BOB G. SHUPE,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

QUESTIONS PRESENTED.

The questions presented by the record are not those stated in the petition.

The Court of Appeals reversed and remanded for a new trial because:

1. The verdict was grossly excessive; and

2. It was "left with the firm conviction there was a miscarriage of justice" because plaintiff's claim at the trial that he was injured by a defective door closer "was so grossly at variance with that of numerous persons with whom he came in contact after the alleged accident."

Therefore, the actual questions posed by the record are:

1. Does a Court of Appeals in a Federal Employers' Liability Act case have the power and duty to order a new trial when it has a firm conviction that the verdict rests solely upon perjured testimony?

2. Whether under the facts of this record the verdict was so grossly excessive as to require a new trial before another jury.

Since the petition fails to set forth the evidence in the record that impelled the Court of Appeals to come to its conclusions, substantial further statement is necessary.

STATEMENT.

On December 19, 1961, petitioner was working in respondent's one-story building at 33 West Root Street, Chicago. Office supplies were kept on the second floor (A. 41). Petitioner's duties included taking them up to the supply room and taking them back down as they were needed by the clerical help (A. 42).

He testified that on the day in question he picked up a 100 lb. cardboard box, put it on his left shoulder, and went up the stairs to the second floor. At the top of the landing was a door leading into the ladies' locker room (A. 45). This door has a device that causes it to close after being opened (A. 44). He claimed that he pulled the door back far enough to get his left foot ahead of it and then he kicked it back. Then, in his words, "When I kicked the door back, I didn't get through fast enough. The door struck the box, almost knocked me to the floor, it was with such force" (A. 48). He claimed he felt a sharp pain in his left shoulder and he put the box down. Afterward he went down and

allegedly reported the incident to Andrew Machtemes (A. 48). Petitioner claimed that the door had been in the condition alleged for fifteen or twenty weeks (A. 49). He said he had reported it to Mr. Joe Walsh, assistant general foreman, and Mr. Raymond Preski, general foreman, about four or five times, the last time two or three weeks before the accident (A. 49, 50). Both Preski and Walsh denied that petitioner ever claimed that the door was defective (A. 188, 241).

As just noted, after the alleged accident petitioner told Machtemes about it (A. 48). Testifying as a witness for *petitioner,* Machtemes said he prepared an accident report on the basis of what petitioner told him, which was introduced into evidence as petitioner's Exhibit 7-A (A. 60). Machtemes testified that petitioner told him he was up in the file room stacking cartons and he picked one up from the floor, *and as he turned to put it on the shelf he felt pain in his left shoulder.* Petitioner never mentioned the door striking him (A. 38). Machtemes' testimony was corroborated by his accident report, which is in his own handwriting, and states: "*While stacking cartons of office material in file room and lifting a carton from floor felt a sudden pain in left shoulder.*" Location of the accident is described as "File room, 2d floor, main building, Root St., Chicago" (A. 366).

Leo Zvitkovits, a witness for petitioner, said he signed petitioner's Exhibit 7, a typewritten accident report prepared by Machtemes and identical to the handwritten one (A. 366).

Petitioner went to see respondent's doctor, Dr. Samuel Garrick, on the same day. Petitioner testified that when he saw Dr. Garrick he told him about the door (A. 98).

Contrariwise, Dr. Garrick, testifying as a *witness for petitioner*, swore that petitioner told him, "He felt pain and a catch in his shoulder while lifting one hundred pounds of crates and piling them in a stack" (A. 64). He stated specifically there was nothing in the history he took from petitioner about his being struck by a door (A. 69).

On the same day he made out a "Surgeon's Report of Personal Injuries" that was introduced into evidence as *petitioner's* Exhibit 16 (A. 70). At the bottom of the form is a caption, "Statement of Injured Person." The doctor typed in, *"Felt pain and 'catch' in left shoulder while lifting 100# crate and stacking crates in piles"* (A. 367).

After treating petitioner for a few weeks Dr. Garrick sent him to another doctor, Eugene A. Hamilton, who saw him on January 9, 1962, some three weeks after the episode. Petitioner testified he gave Dr. Hamilton a history (A. 53), in which he told him about the door (A. 98).

The doctor denied this (A. 268) and said petitioner told him it was part of his duties to carry supplies and that he had to walk upstairs and he felt pain in his shoulder occasionally, but on one particular occasion when he lifted a box he had a little more pain in his shoulder than he had previously (A. 265).

The doctor found limitation of motion in petitioner's shoulder. Pursuant to his direction, petitioner was admitted to St. Joseph's Hospital on January 31, 1962. The official hospital record contains a history taken from petitioner by an intern named Lipovitch, which states in part: "Pt. is a janitor and carries heavy articles on his left shoulder. No past Hx trauma" (pet. Ex. 1; A. 364).

Thus, on admission nothing was said about the door or trauma of any sort.

After certain treatment petitioner was readmitted on May 4, 1962, and the history taken at this time makes no mention of a door being the cause of petitioner's difficulty (pet. Ex. 1, 2d Admission; A. 364). After subsequent treatment, it was decided that petitioner had to be hospitalized again because he might need psychiatric help. Petitioner was readmitted to the hospital on May 9, 1962. At that time he was interviewed by a psychiatrist by the name of Dr. Vanderbosch, whose report of the interview is part of the hospital record on the third admission. The "History from Patient" states that petitioner had had pain in the left shoulder" since last *December when he carried some boxes and 'strained himself'* " (A. 364). Again, there is no mention of a door.

Dr. Vanderbosch testified at the trial and confirmed his hospital entry (A. 204).

Petitioner testified that he was sent home from the hospital because Dr. Hamilton could find nothing wrong with his shoulder (A. 81). He then saw Dr. Baldwin, a family doctor, who transferred him to a Dr. Heck. The latter took a history on May 24. The doctor testified that petitioner said nothing to him about a door and the first time this was mentioned was when he examined petitioner on January 30, 1964, a few months before trial (A. 158). Neither the "Summary of the Case" prepared by a Dr. Yashon nor a "History Sheet" taken by an intern mentions any history of petitioner being hit by a door (A. 365, 366).

Dr. Heck made a diagnosis of acromioclavicular arthritis of the left shoulder (A. 135). He operated on

June 4, cutting through the skin on top of the shoulder and removing a 5/8-inch-long piece of the left distal clavicle and an interarticular disc (A. 139). His object in removing the bone was to eliminate contact between collarbone and shoulderblade. Dr. Heck testified that the condition he found could be described as "wear and tear" or "degenerative arthritis" (A. 140).

On June 7, 1962, an investigator took a statement from petitioner at Presbyterian-St. Luke's Hospital that was introduced into evidence as Defendant's Exhibits 3, 4, and 5 (A. 233). This statement, after reciting that he had been carrying boxes, states in part, "My shoulder became sore gradually, like anyone's would, and finally after one trip I fell to my knees & dropped the box that I was carrying & experienced a severe pain, a sharp pain in my left shoulder."

Petitioner denied making the above statement (A. 179). When asked whether his signature was on the document he said, "It looks like it is. I didn't say it was my signature. It looks like it" (A. 179).

On August 16, 1962, a court reporter took a statement from petitioner and testified that he said, "I injured my left shoulder. • • • Yes, in moving cards, boxes, and things from the first floor of the building upon the second floor, stacking them, and I injured the bone on top of my left shoulder. • • • I stacked them about, I imagine, about 4 or 5 foot high, and caught a pain in my left shoulder" (A. 230).

Petitioner denied making the above statements to the court reporter (A. 100, 101). In petitioner's statement of August 17, 1962, there was a reference to a swinging door, although no claim was made that the door closer was defective (A. 368). Apparently because of this refer-

ence to the claim department requested General Foreman Preski to inspect it in August, 1962, which he proceeded to do but found nothing wrong (A. 187).

STATEMENT ON DAMAGES.

As stated above, on petitioner's third admission to the hospital he had an operation on his left shoulder, the purpose of which was to relieve the arthritic pain caused by the collarbone and shoulderblade coming into contact. Petitioner was discharged on June 15. On July 19, 1962, Dr. Baldwin wrote the following letter to respondent:

> "Mr. Robert Shupe has been under my care and Dr. Charles Heck's care. He suffered from severe acromioclavicular arthritis. His problems have now been resolved and he may return to work." (Resp. Ex. 2; A. 367)

On July 23, 1962, petitioner went to Dr. Hamilton with the letter and requested a back to work examination (A. 291). Dr. Hamilton wrote a letter to Dr. Heck and the doctor wrote back saying that petitioner could raise his arm out to a full 90° and that he had external-internal rotation, that he ought to be allowed to go back to work, and that his range of motion would improve with work (A. 292). Dr. Hamilton performed an examination on August 16, 1962, and recommended that petitioner go back to work. Petitioner returned to work on August 21, 1962, and worked some ten months until June 21, 1963. Petitioner claimed that he had difficulty with his left arm (A. 84). However, there is not a bit of proof that any other employee took over any of the duties he had prior to the accident. He testified that he had to lift 100 lb. crates and take them to the second floor one to three times a week (A. 42). There is no evidence

that, in the ten month period following his return to work, anybody else carried these boxes to the second floor for him. Assistant General Foreman Walsh said that after petitioner returned to work in August, 1962, he did his job fully and that included carrying boxes from the first to the second floor (A. 241). Petitioner did not miss a single day of work until his second accident, referred to below.

The petition states that Dr. Hamilton testified that following his return to work petitioner's arm got worse (Pn. 5). This is not the fact. The record reference shows that the doctor was referring to the condition of petitioner's arm *after his second accident.*

Petitioner's employment was terminated after he had another accident on June 21, 1963. Petitioner was washing windows and fell off the stepladder when it moved (A. 181). According to him, "I busted my back" (A. 98). Petitioner came to Dr. Hamilton's office on July 29, 1963, for a back to work examination (A. 296). He was sent by Dr. Hamilton to a Dr. Davia. On August 21, 1963, he was advised in a letter that Dr. Davia had disqualified him as physically unfit to work. Dr. Hamilton testified that petitioner was disqualified from working because of limitation of motion in his shoulder and because he was wearing a support for his back (A. 297). He concurred in Dr. Davia's disqualification for these reasons (A. 312). At the time of the trial, February, 1964, petitioner was not under any medical care and had received no medical attention since 1962. He estimated that he had about 35% to 40% of normal movement in his left shoulder (A. 83).

Petitioner was earning $91.40 a week (A. 90). He was off from January 31, 1962, to August 20, 1962, with a

wage loss of $2,467.80. Hospital and medical expenses totaled about $1,090 (pet.'s Ex. 6, not printed; A. 146; A. 114).

The complaint herein was filed on October 8, 1962 (A. 2). It alleged, *inter alia*, that because of the defective door closer petitioner had lost, and would lose in the future, large sums of money because he was unable to follow his usual occupation (A. 5). The allegation, of course, was false because the complaint was filed about three weeks after petitioner had returned to work, and his employment was not terminated until June 21, 1963, and after his second accident.

During the trial petitioner's counsel explicitly disavowed attempting to recover damages for the second accident, saying, "We are making no claims for whatever injury he had on that fall which was an injury to his lower back" (A. 87).

REASONS FOR DENIAL OF THE WRIT.

I.

The Court Of Appeals Not Only Has The Power But The Duty To Order A New Trial In A Federal Employers' Liability Act Case, Where, After Reviewing The Whole Record, It Has A Firm Conviction That The Verdict Was Based Upon Perjury.

Petitioner, in listing the alleged questions presented, states, "Can a court of appeals overrule decisions of the Supreme Court?" (Pn. 2). The answer to such a question is obvious; it is equally obvious that no such question is presented by the decision of the Court of Appeals in this case.

The Court of Appeals for the Seventh Circuit was well aware in this case, as it has been in other cases (*Barrett* v. *T.P.&W. R.R. Co.*, 334 F. 2d 803 (C.A. 7); *Keaton* v. *A.T.&S.F. R.R.*, 321 F. 2d 317 (C.A. 7)), of the decisions of this Court relied upon by petitioner. These decisions are concerned with the power of a court to declare, as a matter of law, that the plaintiff has no cause of action. The direction of a verdict, as a matter of law, substitutes the determination of a Court on questions of fact for a jury. The granting of a new trial, on the other hand, merely requires that another jury determine the facts and the plaintiff is still in court. The Court of Appeals stated explicitly, "We do not hold as a matter of law that plaintiff's injury was not caused by the swinging door" (p. 8). However, it was firmly convinced from a review of the whole record that plaintiff's claim of a defective door closer was nothing but a fabrication and remanded the case for determination by another jury.

Before examining more closely the difference between a motion for a new trial and a motion for a directed

verdict, we briefly review the factual bases for the Court of Appeals holding.

At the trial petitioner claimed that he kicked the door back but was unable to get through before the door hit the box on his shoulder because it closed with such speed that he was knocked to the floor (A. 48). He claimed he reported the alleged condition to foremen Walsh and Preski several times before the accident.

Petitioner's trial version of the accident could be true only if the following propositions were also true:

1. Machtemes, *a witness for petitioner,* committed perjury when he testified that petitioner never mentioned the door striking him (A. 39), as petitioner testified at the trial (A. 48).

2. Machtemes made out a false accident report when he wrote that petitioner told him he felt a pain in his shoulder while stacking cartons of office material in the file room (A. 366).

3. Dr. Garrick, *a witness for petitioner,* committed perjury when he testified that petitioner did not tell him about being struck by a door (A. 69), as petitioner claimed at the trial (A. 98).

4. Dr. Garrick made out a false accident report when he stated the cause of the accident, "as stated by injured person," was that petitioner felt pain in the left shoulder while stacking crates (A. 367).

5. Dr. Hamilton committed perjury when he testified that petitioner never said anything about being hit by a door (A. 268), as petitioner claimed at the trial (A. 98).

6. The intern who took petitioner's history on his first admission to the hospital made a false record when he wrote down, "No past Hx trauma" (Pet. Ex. 1; A.

364), since petitioner claimed that he told the admitting doctor about the door (A. 98).

7. Dr. Vanderbosch committed perjury when he testified that petitioner told him that he "strained himself" when he carried some boxes (A. 204).

8. Dr. Vanderbosch wrote a false history when he wrote in the hospital record that petitioner had had pain "in left shoulder since last December when he carried some boxes and 'strained himself'" (A. 364).

9. Dr. Heck, *a witness for petitioner*, committed perjury when he testified that petitioner said nothing to him about a door and that the first time petitioner mentioned it was a few months before trial (A. 158).

10. The intern who took the history at the time of petitioner's admission to St. Luke's Hospital wrote a false history since he mentioned nothing about a door (A. 366), although petitioner testified that when he was admitted he told them about the door (A. 98).

11. The investigator who took a statement from petitioner at St. Luke's Hospital on June 7 wrote a false one since petitioner denied making it (A. 178), which petitioner signed, and which stated, "After one trip I fell to my knees and dropped the box I was carrying and experienced a severe pain, a sharp pain in my left shoulder" (A. 368).

12. The court reporter who testified that petitioner told him he injured his shoulder while stacking boxes (A. 230) committed perjury at the trial since petitioner denied making these statements (A. 100).

13. Foreman Walsh committed perjury when he denied petitioner ever claimed to him that the door was defective (A. 241), as petitioner testified.

14. Foreman Preski committed perjury at the trial when he denied that petitioner had ever complained to him that the door was defective (A. 188), as petitioner testified (A. 49).

15. Foreman Preski committed perjury when he testified that he inspected the door in August, 1962, and found nothing wrong with it (A. 186), since, if the door closer was defective in December, 1961, it would not have rectified itself in the intervening months.

It is beyond the realm of possibility that all or any substantial number of the above propositions could be true. Petitioner's claim was that everyone either lied at the trial or made out a false business record when they recorded or testified what petitioner told them concerning the cause of his shoulder difficulty.

No court lightly sets aside a verdict in an F.E.L.A. case. The opinion of the Court of Appeals was written by Chief Judge Hastings, certainly a most conscientious and able judge. But petitioner's raw, unadulterated, perjury was just too much for him and the other members of the panel to permit to be handsomely rewarded. Although the Court's opinion does not state in so many words that petitioner was guilty of manifest perjury, there is no mistaking that it was of this view. Being "left with a grave doubt as to the truthfulness" of petitioner's trial testimony and "giving regard to the gross excessiveness of the verdict," it held that the case should be remanded for a new trial.

The petition proceeds upon the false assumption that the Court of Appeals held, as a matter of law, that petitioner cannot recover. It did no such thing. There is a well recognized distinction between granting a new trial and turning a plaintiff out of court as a matter of law.

In *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251, the Court said:

> "The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the Court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

In *Garrison* v. *United States*, 62 F. 2d 41, 42 (C.A. 4), the Court said:

> "Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence, where in his opinion, it is contrary to the clear weight of the evidence, or is based on evidence which is false; for, even though the evidence is sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice * * *."

In *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F. 2d 350, 353 (C.A. 4), the Court said:

> "The exercise of this power [to grant a new trial] is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

Federal Employers' Liability Act cases are not different from any other class of cases in regard to whether a new trial should be granted when the Court is convinced that the verdict is based on false evidence. Trial courts have granted motions in F.E.L.A. cases where the verdict has been against the weight of the evidence or recognized their power and duty to do so. *Newsum* v. *Pennsylvania R. Co.*, 97 F. Supp. 500 (D.C. N.Y.); *Cheffey* v. *Pennsylvania R. Co.*, 79 F. Supp. 252 (D.C. Penn.); *Dessi* v. *Pennsylvania R. Co.*, 150 F. Supp. 703, 706, aff'd 251 F. 2d 149 (C.A. 3), *cert. den.* 256 U.S. 167; *Widder* v. *N.Y. C. & St. L. R. Co.*, 142 F. Supp. 830, 835 (D.C. Pa.), aff'd 235 F. 2d 752 (C.A. 3); *Rothwell* v. *Pennsylvania R. Co.*, 87 F. Supp. 706, 707.

Although it is sometimes said that a motion for a new trial is addressed to the District Court's discretion, the Courts of Appeal have held or recognized that they have the power and duty to reverse where there has been an abuse of discretion. *Virginian Ry. Co.* v. *Armentrout*, 166 F. 2d 400, 408 (C.A. 4); *Pettingill* v. *Fuller*, 107 F. 2d 933, 936 (C.A. 2); *Charles* v. *Norfolk & W. Ry. Co.*, 188 F. 2d 691 (C.A. 7), *cert. den.* 342 U.S. 839; *Cobb* v. *Lepisto*, 6 F. 2d 128, 129 (C.A. 9); *Commercial Credit Corp.* v. *Pepper*, 187 F. 2d 71, 75 (C.A. 5); *Campbell* v. *Clark*, 271 F. 2d 578, 581 (C.A. 10); *American Smelting & Refining Co.* v. *Sutyak*, 175 F. 2d 123, 128 (C.A. 10); *Mihalchak* v. *American Dredging Company*, 266 F. 2d 875, 878 (C.A. 3); *Stewart* v. *Gilmore*, 323 F. 2d 389, 391 (C.A. 5). See further, below, cases holding that a Court of Appeals may reverse for abuse of discretion in denying a new trial motion where the verdict is grossly excessive.

The foregoing principle being recognized, the question is whether F.E.L.A. cases are subject to any different

standard of review. We submit, there can be only one answer. The Courts owe it to themselves and to the people to stamp out fraud and perjury when it is manifest. Ultimate responsibility for permitting perjury for profit cannot be avoided by invoking the formula, "issue for the jury." The jury has a large, and almost exclusive, role in determining fact issues in this class of cases, as well as any common law cases, but every principle has its limits, and those limits are necessarily exceeded when a reviewing court is firmly convinced that a verdict rests upon perjury. No system of justice worthy of the name can countenance, either openly or covertly, fraud and perjury in the procurement of successful jury verdicts. In other contexts this Court has expressed concern over the "integrity" of trials in Federal courts and the use of perjury therein. *United States* v. *Shotwell*, 355 U.S. 233, 234; *Mesarosh* v. *United States*, 352 U.S. 1. That concern can be no less in an F.E.L.A. case.

Petitioner has not been put out of court as a matter of law. He still has the opportunity to try to convince another jury. Counsel says that respondent has been given the luxury of repeated trials until such time as a jury returns a verdict for it (Pet. 16). The Court of Appeals has made no such holding. Moore's *Federal Practice*, Vol. 6, p. 3817, points out that "limitless" grants of a new trial on the grounds that the verdict is against the weight of the evidence would violate the constitutional right of trial by jury. It will be time enough to determine how many new trials can properly be granted if that issue should ever arise; it does not arise here.

II.

The Damages Awarded Are Grossly Excessive.

The Court of Appeals held that the verdict was grossly excessive because, subtracting loss of earnings until the second accident, and medical and hospital expenses, from the $125,000 verdict, there was left $121,444.05, most of which had to be ascribed to pain and suffering (Op. p. 5). There is no evidence that petitioner is suffering from any significant pain in his "frozen" shoulder.

Page 13 of the petition has a "damage table" which purports to show that the allowance for pain and suffering was only $47,328.64 (Pet. p. 13). This figure is based upon the assumption that petitioner was rendered permanently and totally disabled from the first accident which is directly contrary to the actual fact.

Counsel states that "Plaintiff's position throughout all phases of this litigation has been that his unemployability was directly attributable to his shoulder injury. This is amply supported by the record" (Pet. p. 12).

The assertion is simply untrue. The complaint herein was filed on October 8, 1962 (A. 2), when petitioner was still working for respondent (A. 84). It alleged, falsely, that because of the accident petitioner was unable to follow his usual occupation (A. 5). Actually, petitioner was then following his usual occupation as janitor for respondent and continued to do so for eight and one half months thereafter and until his second accident (A. 84). With petitioner being steadily employed at the time suit was filed and for several months thereafter, it was not possible to allege that a then nonexistent "unemployability" was attributable to his shoulder injury. During the trial petitioner's counsel stated explicitly

that he was making no claims for damages suffered from the second accident (A. 87) and, in keeping with this theory, the damage instructions given to the jury on petitioner's behalf ignored it (A. 396, 397).

In short, petitioner contends that the Court of Appeals erred because it failed to take into account damages resulting from the second accident, notwithstanding this action was filed before it ever happened, no amendment was made to the pleadings to include it, and counsel expressly disavowed seeking any damages therefor. Even if petitioner had, by his pleadings, declared upon the second accident and alleged that it was causally related to the first, he could not have recovered The second accident did not occur until after petitioner had returned to work and worked continuously for ten months. On June 21, 1963, petitioner "busted" his back when a step-ladder moved, causing him to fall from it (A. 98). Under comparable circumstances many courts have held, as a matter of law, that there is no causal relation between the prior accident and a subsequent one even though a weakened condition resulting from the earlier accident played a part in the later one. *Ault* v. *Kuiper,* 279 Mich. 271 N.W. 530; *Sporna* v. *Kalina,* 184 Minn. 89, 237 N.W. 841; *Wineberg* v. *Borough of Du Bois,* 209 Pa. 430, 58 Atl. 807; *Croak* v. *Croak,* 33 S.W. 2d 998; *S. S. Kresge Co.* v. *Kenney,* 86 F. 2d 651 (App. D. of C.) *Florig* v. *Sears, Roebuck & Co.,* 388 Pa. 419, 130 A. 2d 445; *Armstrong* v. *Bergeron,* 104 N. H. 85, 178 A. 2d 293; *Kolyer* v. *Westmoreland Coal Co.,* 149 Pa. Sup. 473, 27 A. 2d 272. This issue, however, is not presented by the record in this case for the reasons just mentioned. Petitioner may or may not have a right to recover for damages resulting from his second accident in a new law suit but that right was never put in issue in this proceeding.

Since the Court of Appeals held that no reasonable juror would find that petitioner's disability from work was solely attributable to his shoulder injury it had no occasion to consider whether the verdict was grossly excessive, assuming that a jury could properly find that all of petitioner's damages resulted from the first accident. But we submit that, even if the second accident be ignored and all damages be held to have resulted from the first accident, the verdict would still be so grossly excessive that the District Court's denial of respondent's new trial motion would constitute an abuse of discretion.

At the time of trial petitioner said that he had about 35% or 40% movement in his left shoulder (A. 83). He has undergone no medical treatment since his operation. There is no medical or other testimony that petitioner is totally and permanently disabled from working. A man with 35% to 40% restriction of motion in one arm is not completely unemployable, although concededly his employment opportunities are more limited.

The first thing to be noted about the $125,000 verdict is that if it were put in investments at 5% it would give petitioner an income of $6250 a year for life and at his death the principal would not even be touched. Petitioner was earning $4,752.80 a year (A. 90). Consequently, the verdict would give him, without touching the principal, an income of $1500 a year more than when he was working for respondent. In holding verdicts to be grossly excessive, the courts have commented on the fact that the amount of the verdict, safely invested, would return the plaintiff more that he had been earning and still leave the principal intact, particularly where, as here, the injured person was not totally disabled. See, *e.g.*, *C.&O. Ry. Co.* v. *Gainey*, 241 U.S. 494; *Newell* v. *Detroit T. & I. R. Co.*, 235 Mich. 687, 209 N.W. 813, 814; *C. &*

N.W. Ry. Co. v. *Jackson*, 55 Ill. 492, 497; *Penson* v. *Inland Empire Paper Co.*, 73 Wash. 338, 132 P. 39; *St. Louis S.W. R. Co.* v. *Kendall*, 114 Ark. 224, 169 S.W. 822; *Johnson* v. *St. Paul City Ry. Co.*, 67 Minn. 260, 69 N.W. 900; *Palmer* v. *Security Trust Co.*, 242 Mich. 163, 218 N.W. 677; *Kramer* v. *C.M.St.P. & P. R. Co.*, 226 Wis. 118, 276 N.W. 113.

In his damage table petitioner's counsel shows that petitioner had a work expectancy of 15 years and there was a future loss of earnings of $71,292. Assuming for the moment that petitioner was totally and permanently disabled from working again by the first accident—which he was not—the figure is palpably erroneous. Under the law, damages for future loss of earnings must be reduced to the present cash value. *C&O. Ry. Co.* v. *Kelly*, 241 U.S. 485, 489. Reducing a sum of money to be earned in the future to its present cash value can be readily computed from tables that are as standard as multiplication tables. Taking a 5% discount rate—which can be easily obtained in safe investments at this time—loss of earnings for fifteen years in the future is $49,324; taking a 4% rate, $52,834. The table attempts to justify failure to reduce future earnings to present cash value on the theory that it excludes promotions and wage increases (Pet. p. 13). Prospects of promotion for a 45-year-old janitor are so remote as to be nonexistent. With respect to wage increases, it is customary in cases of this nature to put in proof of increases if there have been any between time of injury and time of trial. No such proof was put in in the present case.

Thus, taking counsel's own argument that petitioner had a work expectancy of fifteen years, this would leave approximately $75,000 for pain and suffering. This amount is so excessive as to shock the judicial conscience.

There is no medical testimony that plaintiff is presently suffering from pain—a standard item of proof in a case like this that can be made. It must be remembered that petitioner worked for ten months until the second accident, and if he suffers any pain at all from his "frozen" shoulder it cannot be much, because his own doctor wrote before he returned to work that his problems "have now been resolved and he may return to work" (A. 367). A man suffering any significant amount of pain is not sent back to work by his doctors.

In short, even if all of petitioner's damages can be based on the first accident, the amount allowed by the jury is still so grossly excessive that a denial of respondent's new trial motion would have constituted an abuse of discretion.

Perhaps a word should be said about the power of a court of appeals to review excessive verdicts. Petitioner does not challenge the existence of the power. He asserts, erroneously, the Court of Appeals made its ruling upon incorrect premises.

Until recent years virtually all, if not all, of the courts of appeal took the view that they had no power to set aside a verdict on the grounds of excessiveness or inadequacy; that this was a question addressed solely to the trial court; and if it approved the verdict there was nothing that the reviewing court could do. Today every circuit adheres to the rule that a reviewing court can review the excessiveness (or inadequacy) of a verdict. First: *Ballard* v. *Forbes*, 208 F. 2d 883. Second: *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797. Third: *Trowbridge* v. *Abrasive Co. of Philadelphia*, 190 F. 2d 825. Fourth: *Virginian Railway Co.* v. *Armentrout*, 166 F. 2d 400. Fifth: *Complete Auto Transit* v. *Floyd*, 249 F. 2d 396,

cert. den. 356 U.S. 949. Sixth: *Sebring Trucking Co.* v. *White,* 187 F. 2d 486. Eighth: *Solomon Dehydrating Co.* v. *Guyton,* 294 F. 2d 439, *cert. den.* 368 U.S. 929. Ninth: *Siebrand* v. *Gossnell,* 234 F. 2d 81. Tenth: *Smith* v. *Welch,* 189 F. 2d 832, Dist. of Col.; *Boyle* v. *Bond,* 187 F. 2d 362, 363. The most scholarly treatment of this point is undoubtedly contained in the opinion of the Court of Appeals for the Second Circuit in the *Dagnello* case.

So far as we are advised, this Court has never squarely held whether a Court of Appeals may set aside a verdict in an action for personal injuries upon the grounds of excessiveness. The implication of this Court's language in *Affolder* v. *N.Y., C. & St. L. R. Co.,* 339 U.S. 96, 101, is that a reviewing court may properly do so if it considers the verdict "monstrous." This case has been relied upon by some of the Courts of Appeal in holding that they may review the question of excessiveness.

Once the power to review for excessiveness be acknowledged, it is difficult to imagine a clearer case than this one calling for its exercise.

We submit, that this Court, upon a review of the entire record, must conclude, as did the Court of Appeals, that the gross excessiveness of the verdict, together with petitioner's patently perjurious testimony, require that a new trial be had in the interests of justice. The Court of Appeals said this was "an exceptional case." (Pet. p. 9). We are confident that this Court will reach the same conclusion and uphold the decision below.

The petition should be denied.

Respectfully submitted,

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